No. 82-277

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

—against—

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America

Of Counsel:

RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

ASA D. SOKOLOW
DOUGLAS N. GORDON
BRIAN G. LUSTBADER
ROSENMAN COLIN FREUND
LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

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BRIEF IN OPPOSITION[1]

The central issue presented for review by the instant Petition is whether the Second Circuit properly assessed, under Section 1 of the Sherman Act, 15 U.S.C. § 1, the probative weight of petitioner's conspiracy evidence at trial—a factual question which has no significance to anyone but the parties. Petitioner's attempt to manufacture a conflict among the circuits with respect to the legal principles applied below is based upon a mischaracterization of the Second Circuit's holding; in fact, that holding is fully consistent with the prevailing law in the other courts of appeal.

1 For its designation pursuant to Supreme Court Rule 28.1, Respondent refers to its prior designation in this matter, dated July 22, 1982.

COUNTERSTATEMENT OF THE CASE

The Petition, in its statement of the case, fails to refer to the key undisputed facts which disclose what this case is truly about: whether a dealer can falsely obtain money from a supplier as part of a wide-ranging fraudulent scheme, refuse to make amends when caught, and then use the antitrust laws to insulate himself from any action by the supplier simply because other dealers have complained generally about a marketing practice in which he engaged.

Absent from the Petition is any reference to the prior decision of the Second Circuit in this matter, *Schwimmer* v. *Sony Corporation of America*, 637 F.2d 41 (2d Cir. 1980), where the Court of Appeals *affirmed summary judgment for Sonam* on its counterclaim to recover monies paid to petitioner as the result of false cooperative advertising claims. The court held on the undisputed facts that Sonam had been misled into reimbursing petitioner for advertising expenses which he had never incurred. (*Id.* at 44).

Nor was petitioner's conduct an isolated event. As the Second Circuit below described it:

> "Sonam quickly discovered that nine dealers, at least seven of which were transshippers, had submitted, through a company called Computer Cast, false claims to Sonam totaling nearly $500,000 for commercials supposedly carried on two New York radio stations. The audit revealed that the commercials had never been aired and that the radio station invoices submitted to Sonam by Computer Cast in support of the claims had been forged. One of the 'Computer Cast Nine' was [petitioner], which had been granted credits totaling more than $54,000.
>
> • • •
>
> "[Following suspension by Sonam,] eight of the dealers agreed to Sonam's terms [for reinstatement] in May or early June 1977. By mid-June seven of these eight dealers

had provided the requested affidavits and either made repayments or set up a schedule for repayment. Sonam shortly resumed selling to these seven dealers.

"The only dealer that refused from the outset to make repayment or to give an affidavit was [petitioner]. [Petitioner] never changed its position and in the absence of repayment and an affidavit, Sonam did not reinstate it. [Petitioner] remained suspended until its dealership agreement expired at the end of 1977." (677 F.2d 946, 949-50) (App. 9c, 11c). (footnotes omitted).[2]

Petitioner's antitrust claim is an attempt to parlay his fraudulent conduct into a multi-million-dollar treble-damage bonanza. The Second Circuit recognized this, properly ordering the dismissal of petitioner's antitrust claims for a failure of proof on the threshold Section 1 requirement of concerted action.

THE PROCEEDINGS BELOW

Following a jury finding that Sonam had conspired with some of its dealers to discourage transshipping and a verdict in petitioner's favor for $675,000 (which was then trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15), the district court denied Sonam's motion for judgment *n.o.v.* Despite its characterization of petitioner's conspiracy evidence as "really dubious" (A792), the district court nevertheless held that the jury could properly infer that petitioner's termination was "a signal and a warning to transshippers and a means of putting pressure upon them" and "was motivated by the complaints of other customers." (App. 3b).

The Second Circuit unanimously reversed. (677 F.2d 946) (App. 1c-26c). Without reaching several other grounds prof-

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2 "App." refers to the appendix to the Petition herein. References to "A __" are to the joint appendix in the Second Circuit.

fered by Sonam for reversal (677 F.2d at 952 n.10) (App. 15c n.10), the court (in an opinion by Circuit Judge Kearse, joined by Circuit Judge Newman and District Judge Daly) exhaustively reviewed the record in a light most favorable to petitioner and found "*no evidence* . . . from which the jury could reasonably have inferred that in 1976 or 1977 Sonam and any of its customers entered into an agreement, either express or tacit, to discourage transshipping." (677 F.2d at 953) (App. 18c) (emphasis added). Accordingly, the Second Circuit directed that judgment be entered for Sonam.

Petitioner sought and received additional time within which to seek rehearing by the Second Circuit, on the ground that more time was needed to review carefully "over 2000 pages of the trial record and exhibits" in order to prepare his rehearing petition. (May 12, 1982 Affidavit by petitioner's counsel at ¶ 5). Rehearing was *not* sought, however. Instead, on June 14, 1982, petitioner filed two motions with the Second Circuit: (1) to modify the opinion to "correct" two factual statements; and (2) to modify the judgment to permit petitioner to make a motion for a new trial on remand to the district court. On June 30, 1982, "[w]ithout necessarily accepting [petitioner's] characterizations of the record," the Second Circuit granted petitioner's motion to revise two factual statements in the opinion, but denied petitioner's motion to modify the judgment. (App. 1d, 1e).

On August 16, 1982, petitioner filed his Petition for a writ of certiorari.

I.

THE COURT OF APPEALS REVIEWED THE FACTS RELATING TO THE ALLEGED CONSPIRACY AND CORRECTLY ENTERED JUDGMENT FOR SONAM

Petitioner first suggests that the Court of Appeals misinterpreted *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*Sylvania*"), and that that supposed error led the Second Circuit into conflict with the Seventh Circuit's holding in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 1982-2 Trade Cas. ¶ 64,808 (7th Cir. 1982) ("*Spray-Rite*") and the Eighth Circuit's holding in *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) ("*Battle*") that "proof of a dealer's complaints to the manufacturer . . . and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action." (Petition at 15) (emphasis in original). This characterization of the Second Circuit's opinion bears no resemblance to what the court actually held.

First, the court below did not misinterpret *Sylvania*. (*See* Petition at Question 1 and pages 4, 5, 13). *Sylvania* has nothing to do with the issue resolved by the Second Circuit—the requisite proof of concerted action under Section 1. Rather, the issue in *Sylvania* was whether defendant's contractual restraints were governed by a *per se* rule or the rule of reason. There was no question in *Sylvania* of the existence of concerted action; it was admitted. In fact, the Second Circuit did not even mention *Sylvania*.

Nor is there any conflict among the circuits. The Second Circuit did *not* hold that complaints by competing dealers to a supplier, *plus responsive action* are insufficient to go to the jury on the issue of a Section 1 conspiracy. (*See* Petition at 5, 12, 15, 16). What the Second Circuit held was that the record was insufficient to allow a jury to conclude that Sonam took *any action in response* to the complaints. As the court stated:

> "The facts of record as to what Sonam said to complaining customers, what complaining customers did fol-

lowing the Sonam responses, and what Sonam did with respect to transshipping dealers, are inconsistent with any inference that there was an agreement [between Sonam and its dealers] to discourage transshipping." (677 F.2d at 953) (App. 18c-19c).[3]

The Second Circuit's opinion can be searched in vain for the contrary "holding" that petitioner ascribes to it.

Indeed, the Seventh Circuit in *Spray-Rite* specifically considered the Second Circuit's opinion in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. pending*, No. 81-2215 (May 28, 1982)—upon which the court below relied for the applicable conspiracy principles (677 F.2d at 952) (App. 16c-18c)—and found no conflict. (1982-2 Trade Cas. at p. 71,985 n.8). The rule of law which petitioner espouses is the same in the Second Circuit as it is in the Seventh and Eighth Circuits—that, to quote petitioner, "proof of acts . . . in response to competitor complaints is sufficient" to go to the jury on the issue of concerted action under Section 1. (Petition at 5). What the Second Circuit held was that petitioner had failed to elicit any evidence of such responsive action to warrant submitting the case to the jury.[4]

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3 For example, there was no evidence that any of the complaints mentioned petitioner specifically. (677 F.2d at 949) (App. 7c). Moreover, Sonam did not condition reinstatement of the dealers who submitted false cooperative advertising claims on a cessation of transshipping; indeed, there was no evidence that transshipping was even mentioned and Sonam reinstated several transshippers who had submitted false claims. (677 F.2d at 954) (App. 20c-21c). And there was no evidence that Sonam terminated the dealership of any transshipper other than in connection with the cooperative advertising fraud that resulted in petitioner's termination. (677 F.2d at 954) (App. 20c).

4 In support of its position, petitioner attempts to bootstrap *dictum* by the Third Circuit in Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), into a conflict between the Second Circuit's opinion, on the one hand, and the Seventh Circuit's opinion in *Spray-Rite* and the Eighth Circuit's

In so holding, the Second Circuit did not, as petitioner suggests (Petition at 17, 18), impose a direct-evidence requirement for proving an antitrust conspiracy. Indeed, the court expressly stated:

> "Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proved by 'inferences that may be fairly drawn from the behavior of the alleged conspirators.' " (677 F.2d at 953) (App. 17c) (citations omitted).[5]

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opinion in *Battle*, on the other. According to petitioner, since the Second Circuit cited *Sweeney* approvingly, and since *Sweeney* suggested that even proof of responsive action to complaints might not be enough to infer concerted action, "both [the Second and Third] circuits now require more than a causal link between complaints and response in order to establish a conspiracy." (Petition at 15). In fact, however, the Second Circuit cited *Sweeney* only for the propositions that "a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, [does not] support a finding of conspiracy with them," and that "where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement." (677 F.2d at 953) (App. 17c-18c). And, as the Second Circuit found, the record here is barren of any evidence demonstrating that Sonam's actions were taken in response to customer complaints. Moreover, the language in *Sweeney* relied upon by petitioner is dictum; the Third Circuit in *Sweeney* found no evidence of *action taken in response* to the complaints. (637 F.2d at 111, 115, 116-17).

5 The Second Circuit's use of the word "agreement"—heavily relied upon by petitioner (Petition at 14 & n.19, 16)—did not evidence the adoption of a direct-evidence standard. The court also used the words "conspiracy" (*e.g.*, 677 F.2d at 947, 952 & n.10, 953; App. 2c-3c, 15c & n.10, 16c-17c, 18c), "contract," "combination" (*e.g.*, 677 F.2d at 952; App. 16c-17c) and "concerted action" (*e.g.*, 677 F.2d at 952; App. 16c). The interchangeable use of these words is perfectly consistent with the well-settled view that they all refer to the single requirement under Section 1 that there be proof of more than unilateral action. *See* L. Sullivan, *Antitrust* § 109 at p. 312 (1977) (" 'contract . . . , combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action' ").

In sum, in *Spray-Rite* and *Battle*, after reviewing the evidence, the courts concluded that there was sufficient proof that defendants had *acted in response* to dealers' complaints to raise a reasonable inference of concerted action. In contrast, the court below, after assessing a different record, concluded that there was insufficient evidence of *responsive action* to raise such an inference; indeed, the court held that the facts were "inconsistent" with such an inference. (677 F.2d at 953) (App. 18c-19c). The difference in result between this case and *Spray-Rite* and *Battle* is not due to the application of conflicting legal principles; it is due to petitioner's failure of proof. The Second Circuit's opinion makes clear that it engaged in a detailed factual review of the evidence most favorable to petitioner; it did not perceive that any grave issues of law were involved.[6] This is not a matter for certiorari. As Mr. Justice Holmes declared in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts."

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6 The lengths to which petitioner has gone to develop a conflict among the circuits is demonstrated by his distortions of the Second Circuit's opinion. For example, the court did not concede, as petitioner suggests, that there was some evidence of actions by Sonam in response to the complaints. (Petition at 12). On the contrary, in the portion of the opinion cited by petitioner, the court noted that the evidence from Sadowy—plaintiff's own lead witness and the Sonam employee who orchestrated the cooperative advertising fraud on Sonam (677 F.2d at 949-50) (App. 9c-10c)—showed nothing more than conversations between Sonam and two accounts (Macy's and A&S) in which those accounts complained to Sonam about transshipping generally. The court explained that Sadowy's testimony established that Macy's brought out their own brand because of a *lack* of response by Sonam; and that although Sadowy testified that a Sonam executive "tried to assure [A&S that Sonam was] working on programs to help [it] out," Sadowy also explained that A&S "stopped buying Sony's products at that point," rebutting any inference that those conversations led to any *action* by Sonam *in response* to A&S's complaints. (677 F.2d at 948 & n.4) (App. 6c-7c & n.4).

II.

THE COURT OF APPEALS' "FIELD OF VISION" IS NOT PROPERLY BEFORE THIS COURT AND, IN ALL EVENTS, THAT "FIELD OF VISION" WAS PROPERLY CONFINED

Petitioner's assertion that certiorari should be granted to resolve a conflict among the circuits concerning the "field of vision" to be applied by the courts of appeals in reviewing the grant or denial of judgment *n.o.v.* is equally without merit for two independently sufficient reasons.

First, petitioner never raised this argument below, although given ample opportunity to do so. Sonam set forth the proper standard of appellate review in its opening brief to the Second Circuit, citing and quoting from *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976), which the court below, in turn, quoted. (677 F.2d at 952) (App. 17c). Petitioner never quarreled with Sonam's statement of that standard in his Second Circuit brief.

Thereafter, petitioner sought additional time within which to petition the Second Circuit for rehearing "on a number of grounds," *including* "the proper standard of appellate review." (May 12, 1982 Affidavit by petitioner's counsel at ¶ 4). However, petitioner did *not* seek rehearing to challenge the Court of Appeals' "field of vision." And, although petitioner made two different motions to the Second Circuit on June 14, 1982, petitioner still did not raise his "field of vision" argument. In fact, petitioner concedes that the Second Circuit did not address the question. (Petition at 12; see *id.* at 21 n.34). Rather, petitioner sat back and waited until he filed his petition with this Court to raise the "field of vision" issue for the first time.

It is well settled that "[t]his Court sits as a court of review. It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States*,

274 U.S. 195, 200 (1927). *Accord, Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). This is not such an exceptional case—a category which has been strictly limited to assertions directly involving constitutional rights or gross injustice. *Youakim* v. *Miller*, 425 U.S. 231, 233-34 (1976); *Rogers* v. *United States*, 422 U.S. 35, 41 (1975).

In all events, the Second Circuit applied the proper standard of review, stating:

> "The function of an appellate court reviewing the denial of a judgment n.o.v. is essentially the same as the function of the trial court in ruling on the judgment n.o.v. motion. *Both courts must determine whether the evidence, viewed in the light most favorable to the party that secured the verdict, was sufficient to allow a reasonable juror to arrive at the verdict rendered. H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981); 5A Moore's Federal Practice ¶ 50.07[2] (2d ed. 1981). As we stated recently in the *Eli Lilly* case, 'we must determine, *without weighing the credibility of the evidence but viewing it most favorably to the plaintiff*, whether "there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice Par. 50.07[2] (2d ed. 1980); see also *Beech Cinema* v. *Twentieth Century-Fox Film*, 622 F.2d 1106, 1107-08 (2d Cir. 1980). *To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury.*
>
> "If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *Michelman* v. *Clark-Schwebel Fiber*

> *Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976).'
>
> 662 F.2d at 940-41. *Our review of the record in the present case convinces us that, even after drawing all permissible inferences in favor of Schwimmer, there was insufficient evidence from which the jury could rationally conclude that Sonam had entered into an unlawful conspiracy.*"

(677 F.2d at 951-52) (App. 14c-15c) (emphasis added; footnote omitted).

It is thus plain that the Second Circuit considered only the evidence viewed most favorably to petitioner in reaching its decision. Hanging all his hopes on the single phrase "all the evidence" in the court's quote from *Michelman*, petitioner contends that the court in fact reviewed *all* the evidence, *not just that most favorable to petitioner.* (Petition at 21 & n.34). Petitioner conveniently ignores, however, the fact that the very phrase was immediately modified as follows: "after viewing *all* the evidence *most favorably to plaintiff* . . . ." Petitioner's effort to elevate semantics above substance is unavailing. Indeed, in *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. pending*, No. 81-2215 (May 28, 1982), Moore's counsel (the same counsel as petitioner's herein) adopted the very field of vision used by the Second Circuit in this case: "[W]hen all of the evidence is in fact viewed in the light most favorable to Moore . . . ." (Nov. 20, 1981 Petition For Rehearing in *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, No. 81-7090 (2d Cir.) at 12).

There are no "magic words" which describe the standard for review of the grant or denial of judgment *n.o.v.* As this Court explained in *Galloway* v. *United States*, 319 U.S. 372, 395 (1943), in affirming judgment *n.o.v.* for defendant:

> "[S]tandards . . . cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one

> general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence,' or vice versa. *The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.* The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the [Seventh] Amendment requires to be followed." (Emphasis added) (footnotes omitted).

The Second Circuit evaluated the evidence in the light most favorable to petitioner, gave petitioner the benefit of all reasonable inferences, and concluded that there was "*no evidence* in the record" to support a reasonable inference that Sonam conspired with its dealers to discourage transshipping. (677 F.2d 953) (App. 18c) (emphasis added). The court did not, as petitioner states, "consider contradicted and impeached testimony. . . ." favorable to Sonam. (Petition at 23). Indeed, the court did not even find it necessary to rely upon uncontradicted and unimpeached evidence favorable to Sonam to point out the insufficiency of petitioner's case-in-chief.

The very examples relied upon by petitioner demonstrate that the court did not go beyond the evidence favorable to petitioner in concluding that there was no reasonable basis for an inference that Sonam and its dealers conspired to discourage transshipping. Thus, for instance, the court did not rely on Sonam's witnesses (Petition at 21) to support its conclusion that Sonam did not take any action in response to the dealer complaints. The court specifically examined at length the testimony of Sadowy, *petitioner's own lead witness*, and concluded that Sadowy's testimony "negative[d]" any

inference of responsive action by Sonam. (677 F.2d at 948 & n.4) (App. 5c-7c & n.4).[7]

Similarly, the documentary evidence cited by petitioner (Petition at 21) merely indicated that Sonam would try to help a complaining dealer with its marketing problems. Without more—without proof that Sonam in fact took any action in response to this complaint—this letter does not give rise to an inference of a conspiracy to discourage transshipping.[8]

Finally—to avoid burdening this Court with a point-by-point rebuttal of all petitioner's misleading examples—the inference of conspiracy which petitioner seeks from his low credit line was rebutted by *petitioner's own concession* that his financial statement was weak and by *evidence introduced by petitioner* showing that other transshippers had high credit lines. (677 F.2d at 955) (App. 21c-22c) (*see* A1039-45, Plaintiff's Exhibit 72; A1065-66, Plaintiff's Exhibit 131).

Thus, an examination of the Court of Appeals' application of the standard of review demonstrates that no intervention by this Court is appropriate.

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7 The court went on to refer to testimony of Sonam's witnesses consistent with a lack of responsive action. Since it was petitioner's burden to prove responsive action by Sonam, the court did not *rely* on the testimony by Sonam's witnesses to prove a *lack* of responsive action; that was not Sonam's burden.

8 Again, the court's reference to the testimony of a Sonam witness merely confirmed the lack of responsive action. Put another way, without more, petitioner's proof was insufficient.

III.

THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMAND TO THE DISTRICT COURT FOR POSSIBLE CONSIDERATION OF A MOTION FOR A NEW TRIAL

Petitioner's third claim is that the Second Circuit erred in denying his motion to modify the judgment to permit the district court to *reconsider* the admissibility of two items of evidence which it had excluded at trial and, then, if the evidence were deemed admissible in light of the Second Circuit's holding, to allow the district court to consider a motion by petitioner for a new trial.

Petitioner concedes that the two items of evidence were excluded by the district court in the exercise of its discretion pursuant to Rule 403 of the Federal Rules of Evidence. (Petition at 26). Petitioner has never challenged those exclusions as reversible error. That is not surprising since a reversal for abuse of discretion under Rule 403 is unheard of "in all but rare cases of egregious abuse." 10 MOORE'S FEDERAL PRACTICE § 403.02[4] at IV-74 (2d ed. 1982). *Accord, United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

Instead, petitioner asked the Court of Appeals to remand and allow the district court: first to reconsider two evidentiary rulings; and then to grant a new trial *if* it reversed its prior rulings and allowed the evidence to be admitted—the theory being that those two extra bits of evidence would somehow raise a jury question on the issue of conspiracy.

Plaintiff's argument is untenable. The Court of Appeals was well within its authority under this Court's precedents to deny petitioner's motion. As this Court recognized in *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), in most cases it is within the discretion of the Court of Appeals to rule on a request for a new trial made by a party, such as petitioner, who has successfully resisted a motion for judgment *n.o.v.* in

the district court, only to lose on that issue in the Court of Appeals. *Neely* held that in a case such as this one—where the erroneous exclusion of evidence is asserted as the basis for a new trial—the issue is ripe for disposition by the Court of Appeals:

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. . . . [T]here remain important considerations which may entitle [the plaintiff-appellee] to a new trial. The *erroneous exclusion of evidence* which would have strengthened his case is an important possibility. . . . *But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court.* Cf. *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 574 . . . . *Final action on these issues normally rests with the court of appeals.*" (386 U.S. at 327-28) (emphasis added).[9]

Neely thus not only authorizes, but encourages, Courts of

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9 Iacurci v. Lummus Co., 387 U.S. 86 (1967), fell into that limited class of cases described in *Neely* where the Court of Appeals should not decide the new trial issue in the first instance. The right to a new trial in *Iacurci* turned on the jury's failure to follow the instructions contained in the special interrogatory submitted to it by the district court. Because no explanation for that failure was suggested by the record on appeal, the Court of Appeals was in a much poorer position than the district court to evaluate the new trial issue. *Iacurci* therefore is not inconsistent with *Neely*.

Appeals to resolve new trial requests based on the exclusion of evidence. And that is precisely what the Second Circuit did.[10]

Moreover, even if the two items of excluded evidence relied upon by plaintiff—(1) the Second Circuit's decision involving different products in *Eiberger* v. *Sony Corporation of America*, 622 F.2d 1068 (2d Cir. 1980), and (2) Sonam's contacts with the Manhattan District Attorney—had been before the jury, there still would not have been "a reasonable basis for an inference that in 1976 or 1977 Sonam and its dealers had entered into an agreement to discourage transshipping." (677 F.2d at 956) (App. 26c). The *Eiberger* decision and the contacts with the Manhattan District Attorney were proffered at trial by petitioner on the issue of Sonam's intent. Petitioner concedes as much, asserting that the evidence went to the issue of Sonam's motive, "plan and intent." (Petition at 26). The excluded evidence has no probative value on the issue of conspiracy, the crucial issue in the Court of Appeals.

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10 Contrary to petitioner's assertion (Petition at 26), Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), was clarified by *Neely* and limited to the proposition that a Court of Appeals is without power to direct entry of judgment for defendant where the defendant fails to move for judgment *n.o.v.* below, but only moves for a new trial. (386 U.S. at 324). That, needless to say, is not the case here.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: September 29, 1982

Respectfully submitted,

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America

Of Counsel:

RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

ASA D. SOKOLOW
DOUGLAS N. GORDON
BRIAN G. LUSTBADER
ROSENMAN COLIN FREUND
LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

PROOF OF SERVICE

I, Joshua F. Greenberg, counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, certify that on September 29, 1982, I served copies of the foregoing Brief In Opposition by hand on I. Scott Bass, 747 Third Avenue, New York, New York 10017, attorney for Petitioner. I further certify that all parties required to be served have been served.

Dated: September 29, 1982

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America